

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP.
AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"**

Applicant

**FACTUM OF THE
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

(Motion Returnable October 27, 2009)

October 23, 2009

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Applicants

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**FACTUM OF THE
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

PART I: OVERVIEW

1. On October 6, 2009, the Applicants obtained an order under the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against them ("Initial Order").
2. This factum is filed by the Communications, Energy and Paperworkers Union of Canada and its Local Unions namely Locals 721M, 722M and Local 1100 (the "CEP") in support of its motion for an order or declaration that the Applicant, Canwest Global Communications Corp. ("Canwest"), comply with the terms of its applicable collective agreement with the CEP in respect of ongoing grievance arbitration proceedings.

3. Specifically, the CEP seeks an order lifting the stay of proceedings, as provided in the Initial Order, permitting the Union to proceed with its arbitration proceeding against Canwest concerning the termination of Vicki Anderson.
4. The CEP respectfully submits that it is just, equitable and not inconsistent with Canwest's restructuring endeavours for this Honourable Court to exercise its discretion and issue the order sought.

PART II: FACTS

5. The CEP is the bargaining agent and together its Local Unions namely Locals 721M, 722M and Local 1100 are subject to collective agreements with Global Ontario, a division of Canwest Mediaworks Inc. Among these collective agreements is a collective agreement that governs the terms and conditions of employment at Canwest in Toronto.

Reference: Application Record, Affidavit of David Lewington sworn October 21, 2009, page 4

6. An employee of Canwest, Ms. Vicki Anderson, was terminated effective July 27, 2007. The Union filed a grievance on August 21, 2007 asserting that the Company did not have just cause to terminate the employment of Ms. Anderson.

Reference: Application Record, Affidavit of David Lewington sworn October 21, 2009, page 7

7. Ms. Anderson's grievance was progressed to grievance arbitration. There have been eight (8) days of hearing before Arbitrator Levinson. All evidence has been called. One further date, November 3, 2009, has been scheduled for final argument.

Reference: Application Record, Affidavit of David Lewington
sworn October 21, 2009, page 7

8. By way of a letter dated October 20, 2009 to counsel for Canwest, the Union has requested an agreement to permit the November 3, 2009 hearing date to proceed notwithstanding the stay of proceedings provided for in the Initial Order.

Reference: Application Record, Affidavit of David Lewington
sworn October 21, 2009, page 7

9. To date, no agreement has been reached permitting the grievance of Ms. Anderson to proceed.

PART III: ISSUES AND THE LAW

10. The CEP respectfully submits that the following issue is central to the disposition of its motion:

- (i) Is it appropriate for this Honourable Court to issue an order directing Canwest to lift the stay to permit the arbitration proceedings concerning Ms. Anderston's termination to continue?

11. It is the CEP's position that there is no reason for the Court to deny the order sought in the instant motion and sound reasons exist to grant the order sought.

Sound Reasons to Grant the Order Sought

12. Pursuant to the *CCAA*, Courts are vested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts.

Skeena Cellulose Inc., Re: 13 B.C.L.R. (4th) 236 at paragraphs 38-39.

13. Section 11 of the *CCAA* has been interpreted on the basis of an equitable balancing of convenience and potential prejudice to either party in respect of lifting a stay ordered by the Court. For instance, in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]), McFarlane J.A. states in his closing remarks:

In supervising a proceeding under the *C.C.A.A.* orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]) at paragraph 30.

14. Where "sound reasons" exist, this Honourable Court should exercise its statutory discretion and permit a party to pursue its rights against a debtor company subject to a *CCAA* proceeding. In determining what constitutes "sound reasons," the following factors must be considered:
- (a) The balance of convenience;
 - (b) The relative prejudice to the parties; and

(c) The merits of the proposed action.

ICR Commercial Real Estate (Regine) Ltd. v. Bricore Land Group Ltd., [2007] S.J. No. 313 at paragraph 68.

15. The balance of convenience in the within matter weighs heavily in favour of permitting the CEP to continue the grievance arbitration proceedings on Ms. Anderson's behalf.
16. In the context of the grievance proceedings, CEP is seeking to compel Canwest to comply with its obligations that flow from the collective agreement, specifically the provision requiring just cause for discipline and/or discharge.
17. Both CEP and Canwest have invested time and resources in the course of the eight days of hearing that have taken place in Ms. Anderson's grievance arbitration.
18. The one remaining day scheduled is scheduled for final argument only. It is both parties' intention to conclude the case on November 3, 2009.
19. The grievance proceedings are in no way abusive or vexatious; rather, the dispute in issue in the grievance arbitration raises Ms. Anderson's vital interest in the prospect of her ongoing employment at Canwest. For Ms. Anderson and CEP, this interest is significant and critical.
20. In *Re: Lehndorff General Partner Ltd.* [1993] O.J. No. 14, Farley J outlined the purposes of a stay of proceedings in CCAA proceedings. At page 7, Farley J notes

with approval Blair J's reasoning set out in *Campeau v. Olympia & York Developments Ltd.* unreported, (1992) O.J. No. 1946 at pp. 4-7. In the passage cited by Farley J, Blair J explains that the Court's discretionary power to restrain judicial or extra judicial conduct against the debtor company is necessary in CCAA proceedings to stay such conduct that would have the effect of seriously impairing the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. Blair J continues:

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66. **The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.** [emphasis added]

Re: Lehndorff General Partner Ltd., [1993] O.J. No. 14 at page 7 [QL].

21. The CEP respectfully submits that the balance of convenience does not favour denying CEP the opportunity to conclude the grievance arbitration proceedings. There is nothing oppressive, vexatious or abusive in the grievance arbitration involving a terminated employee.

22. Moreover, arguing the final day of grievance arbitration proceedings will not pose the kind of oppressive or prejudicial effect on the Applicant's efforts to restructure that constitutes the purpose of that jurisdiction under the CCAA.
23. In the circumstances, the denial of CEP's opportunity to present final argument on Ms. Anderson's behalf may serve as an injustice to CEP and Ms. Anderson. CEP and Ms. Anderson have no other legal recourse for appealing her dismissal outside of the grievance arbitration proceedings.
24. For the above reasons, the balance of convenience therefore lies heavily in favour of granting the order sought by the CEP.
25. Further, CEP respectfully submits that the order sought by the CEP would not prejudice Canwest or its restructuring process.
26. As noted, the evidence over the course of the eight day arbitration hearing has been completed. There is only final argument to be presented. Accordingly, the preponderance of the preparation work has been completed at this time. The final day of argument will require the legal argument of the parties' counsel; while Canwest's counsel will have to prepare for such hearing, this preparation work ought not require the Applicant's attention and thereby ought not to impact on or prejudice whatsoever the Applicant's efforts to restructure its business.
27. Should CEP be unsuccessful in the grievance arbitration, there will be no prejudice whatsoever to Canwest.

28. On the other hand, should CEP's grievance be successful and Ms. Anderson be ordered reinstated by Arbitrator Levinson, there may or may not be compensation ordered.
29. CEP respectfully submits that Ms. Anderson has endured hardship as a result of Canwest's termination of her employment and has a vital interest at stake in the grievance arbitration proceedings. The prejudice to CEP and Ms. Anderson to be denied the completion of lengthy grievance arbitration proceedings involves the effective denial of any kind of remedy for her dismissal.
30. At present, CEP requests the opportunity to proceed with final argument on November 3, 2009 and complete the outstanding grievance arbitration proceedings.
31. Based on the foregoing, there exist sound reasons to permit the CEP to assert its rights to proceed with Ms. Anderson's grievance arbitration notwithstanding the Initial Order of this Honourable Court. Further, there exist sound reasons for this Honourable Court to exercise its statutory discretion and issue an order requiring permitting the CEP to complete the grievance arbitration proceedings that had been previously commenced.

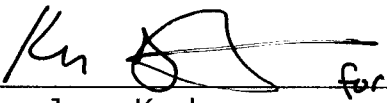
PART IV: ORDER SOUGHT

32. The CEP respectfully requests that this Honourable Court issue the following orders:

- (a) An Order lifting the stay of proceedings, as provided in the Initial Order, permitting the Union to proceed with its arbitration proceeding against Canwest Global (the "Company") concerning the termination of Vicki Anderson.

- (b) An Order that the Applicants are directed to pay any debts incurred in respect of the services provided by Arbitrator Barry Levinson in connection with the grievance of Ms. Vicki Anderson.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2009.



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SCHEDULE A

LIST OF AUTHORITIES

1. *Skeena Cellulose Inc., Re:* 13 B.C.L.R. (4th) 236
2. *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers])
3. *ICR Commercial Real Estate (Regine) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313
4. *Re: Lehndorff General Partner Ltd.* [1993] O.J. No. 14

SCHEDULE B**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended:

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceedings against the company.

20 The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

IN THE MATTER OF the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Global Communications Corp.
and the other Applicants listed on Schedule "A"

Court File No. CV-09-8396-00CL

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